

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES GINSKEY, RICHARD FITZGERALD,
CHARLES CERF, BARRY DONNER, and on
behalf of the class members described below,

Plaintiffs,

vs.

NATIONAL SECURITIES CORPORATION, a
Washington Corporation;

Defendants.

Case No. 2:18-cv-01773-RSM

**DEFENDANT NATIONAL SECURITIES
CORPORATION'S MOTION TO STAY
PROCEEDINGS PENDING APPEAL**

I. INTRODUCTION

Defendant National Securities Corporation ("NSC"), moves this Court to stay this action pending the resolution of NSC's Petition for Permission to Appeal ("Petition") this Court's April 27, 2021 Order, which granted Plaintiffs' Motion for Class Certification (hereafter, the "Order") Dkt. #66. Defendant's Petition asks the Court of Appeals to resolve important legal questions raised by the Order. If the Court of Appeals answers those questions in NSC's favor, this case may not proceed as a class action. Defendant now respectfully requests that this Court stay further proceedings pending final disposition of the Petition and any appeal, if permitted.

II. FACTUAL AND PROCEDURAL BACKGROUND

At issue in this case are Plaintiffs' investments in Beamreach Solar¹ ("Beamreach"), through NSC, a FINRA registered brokerage firm. In early 2015, NSC began acting as a placement agent for Beamreach, a solar panel company. Dkt. #62 ¶3. A placement agent's role is to assist a company in raising capital by introducing prospective investors to the company. *Id.* NSC made two private placement offerings on behalf of Beamreach (collectively, the "Beamreach Offerings"). *Id.* Each Beamreach Private Placement Memoranda provided with the Beamreach Offerings contained extensive warnings to investors about the high-risk nature of investing in Beamreach and expressly described the Beamreach investments as having a "high degree of risk." Dkt. #62 Exs. A at NSC000022; B at NSC000406; C at NSC000676 (emphasis added).

The NSC Beamreach Offerings were only made to "a limited group of sophisticated 'accredited investors' within the meaning of Rule 501(a) under the Securities Act of 1933 as amended (the 'Securities Act'), in a private placement designed to be exempt from registration under the Securities Act, and other applicable securities laws." *Id.* Exs. A at NSC000001; B at NSC000383; C at NSC000665. Accordingly, Plaintiffs were all high net worth, experienced investors. Additionally, each investor had a different risk profile that they provided to NSC. *See* Dkt. #63 Exs. 2, 4, 5, 7, 8, 10, 11.

Relying on FINRA's rule requiring brokers to determine whether a security is suitable for sale, Plaintiffs brought state law negligence claims alleging that NSC was negligent by: (1) not

¹ Beamreach was previously known as "Solixel."

1 conducting adequate due diligence on Beamreach; and (2) failing to understand the risks and
 2 rewards of the Beamreach offerings or consciously ignoring the risks presented by those red flags.
 3 Dkt. #1 ¶¶131-166. Plaintiffs also have made a state law claim for unjust enrichment. Dkt. #1
 4 ¶¶167-174.

5
 6 On April 27, 2021, this Court certified a Civil Rule 23(b)(3) class and three sub-classes of
 7 Beamreach investors who resided in 41 jurisdictions and worked with 27 NSC brokers located in
 8 five states. Dkt. #66. The Order requires Plaintiffs to submit to NSC the proposed Notice forms
 9 and the Plan for disseminating Notice to the Class and Subclasses. It also requires counsel to confer
 10 and submit an agreed Notice and Plan to the Court. On May 11, 2021, NSC filed the attached
 11 Petition with the United States Court of Appeals for the Ninth Circuit, asking this Court to grant
 12 NSC's leave under Fed. R. Civ. P. 23(f) to immediately appeal the Order. Defendant's Petition is
 13 timely under Fed. R. Civ. P. 23(f) (petition must be filed within 14 days after entry of order); *see*
 14 *also Beck v. Boeing Co.*, 320 F.3d 1021, 1023 (9th Cir. 2003).

15
 16 NSC files this motion and respectfully requests this Court to enter a stay pending resolution
 17 by the Ninth Circuit of the Petition and any subsequent appeal. As demonstrated below, a stay is
 18 appropriate pending guidance from the Ninth Circuit on how, and if, this case may proceed as a
 19 class action. No interest of the parties, class members, the Court, or the public is served by
 20 proceeding with class notice and trial preparation given the pending appeal of class certification.
 21 To the contrary, to continue proceedings under these circumstances would be inconsistent with the
 22 efficient use of the parties' resources and judicial economy.

23 24 **III. LAW AND ARGUMENT**

25 Fed. R. Civ. P. 23(f) does not provide for an automatic stay of proceedings when a petition
 26 for permission to appeal is filed; however, a district court has discretion to stay a proceeding.
 27

1 *Hooper v. City of Seattle*, Case No. C17-77 RSM, 2017 U.S. Dist. LEXIS 209353, at *2 (W.D.
 2 Wash. Dec. 20, 2017) (citing *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1180 (9th Cir. 2017))
 3 (Judge R. Martinez granting motion to stay proceedings pending appeal). There are four factors
 4 courts consider when considering whether to grant a stay pending appeal: “(1) whether the
 5 applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the
 6 moving party will be irreparably injured absent a stay; (3) whether a stay will substantially injure
 7 the opposing party; and (4) whether the public interest favors a stay.” *B.F. v. Amazon.com Inc.*,
 8 Case No. C19-910-RAJ-MLP, 2020 U.S. Dist. LEXIS 115562, at *4-*5 (W.D. Wash. May 15,
 9 2020) (citing *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990); *Hilton v.*
 10 *Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L. Ed. 2d 724 (1986)). ““The first two factors .
 11 . . are the most critical.”” *B.F.*, 2020 U.S. Dist. LEXIS 115562, at *5 (citing *Nken v. Holder*, 556
 12 U.S. 418, 434, 129 S. Ct. 1749, 173 L.Ed. 2d 550 (2009)).

15 **A. Defendant’s Petition Raises Substantial Legal Questions**

16 A party ““must show, at a minimum, that [they have] a substantial case for relief on the
 17 merits.”” *B.F.*, 2020 U.S. Dist. LEXIS 115562, at *5 (citing *Leiva-Perez v. Holder*, 640 F.3d 962,
 18 964 (9th Cir. 2011)). If a party is able to show the issue raised on appeal raises a serious legal
 19 question and the remaining factors courts consider favor a stay, a party does not need to show that
 20 they are more likely than not to win on the merits. *Id.* Defendant includes at least two such
 21 questions in its Petition, which raise the issue of whether this Court’s grant of class certification
 22 was proper in this instance.

24 **(i) Defendant Seeks Review Of This Court’s Conflicts Of Law Analysis,** 25 **Which Raises A Serious Legal Question.**

26 First, NSC seeks review of this Court’s conflicts of law analysis. NSC argues in its Petition
 27 that this Court did not conduct a rigorous choice of law analysis and committed manifest error by

1 deciding that either Washington or New York law would apply to all class members despite
 2 Beamreach investors residing in 39 states, Washington, D.C., and Switzerland. Dkt. #62 ¶9. In the
 3 petition, NSC argues that the choice of law decision was manifestly erroneous because potentially
 4 41 different jurisdictions' laws apply to Plaintiffs' state law claims and this Court did not analyze
 5 the conflict of laws issue under constitutional due process or Washington state's "most significant
 6 relationship" test for each jurisdiction with an interest in this litigation. *See Phillips Petroleum Co.*
 7 *v. Shutts*, 472 U.S. 797, 821-22, 105 S. Ct. 2965, 2979, 86 L. Ed. 2d 628 (1985) (applying forum
 8 state law to out-of-state class members must conform with due process); *FutureSelect Portfolio*
 9 *Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 967, 331 P.3d 29, 36 (2014).

11 There are substantial variations in state negligence and unjust enrichment claims. *See Haley*
 12 *v. Medtronic, Inc.*, 169 F.R.D. 643, 653 (C.D.Cal.1996) ("[N]o matter how similar—or
 13 comparable—each state's law on negligence may be, it is clear—despite plaintiffs' argument—that
 14 the negligence laws of the fifty states have some differences."). Due to the differences in the laws
 15 of each jurisdiction, this Court needed to analyze conflicts of law for each of the 41 jurisdictions
 16 with interests in this litigation before determining that Washington or New York law applied to all
 17 class members' claims. *See Zinser v. Accufix Research Ins., Inc.*, 253 F.3d 1180, 1188 (9th Cir.),
 18 opinion amended on denial of reh'g, 273 F.3d 1266 (9th Cir. 2001)(reversing class certification
 19 and refusing to apply single negligence law of state where manufacturer was headquartered to
 20 nationwide class). The Court's decision to apply the law of the location of NSC's headquarters
 21 was contrary to the Washington State Supreme Court's ruling in *FutureSelect*. *See FutureSelect*
 22 *Portfolio Mgmt.*, 180 Wn.2d at 967 ("Washington has a strong interest in giving Washington
 23 investors the benefit of Washington law and in requiring the sellers of securities to comply with
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1 it,” recognizing that Washington had a more compelling interest in protecting investors than New
 2 York did in regulating its sellers of securities.)

3 This Court also appears to have accepted Plaintiffs’ argument that Washington law would
 4 apply here because allegedly “Defendant had previously admitted to the applicability of
 5 Washington law.” Dkt. #66 at 7:21-23. But in making this argument, Plaintiffs failed to provide
 6 this Court with Ninth Circuit controlling law on this issue (*Gen. Signal Corp. v. MCI Telecomms.*
 7 *Corp.*, 66 F.3d 1500, 1505 (9th Cir. 1995)) and NSC never had the opportunity to respond to this
 8 argument Plaintiffs raised on reply. In *Gen. Signal*, this Court recognized under similar
 9 circumstances that earlier reliance on a forum’s law does not judicially estop a party from later
 10 asserting a conflict of law. 66 F.3d at 1505.
 11

12 Because of the conflicts of law issue, NSC contends it was manifest error to find that the
 13 class satisfied the commonality, typicality, predominance, and superiority requirements for
 14 certification.
 15

16 **(ii) Defendant Seeks Review Of This Court’s Analysis Of Whether**
 17 **Common Questions Predominate Over Individualized Issues Of**
 18 **Suitability, Which Raises A Serious Legal Question.**

19 Defendant also seeks review of this Court’s determination that common questions
 20 predominate over individualized issues with regard to suitability, which presents a substantial issue
 21 meriting a stay. First, this Court held that the “question of due diligence prior to approval for sale
 22 predominates over any questions affecting individual brokers or investors.” Dkt. #66 at 11:4-7. In
 23 order to answer the question of due diligence prior to approval for the sale, there must be an
 24 analysis of the 27 individual NSC brokers who conducted the due diligence prior to the approval
 25 of Beamreach. Dkt. #60 at 2.

26 According to NSC’s own policies and FINRA’s suitability rule 2111.05, due diligence is
 27

1 conducted by both NSC firm-wide and its individual brokers. Dkt. #62 ¶5, Ex. D. NSC performs
2 due diligence and makes a firmwide-level suitability determination for each investment to
3 determine whether it is suitable to be sold to any investor before NSC's individual brokers may
4 offer it for sale. *Id.* Then, each broker must make his or her own suitability determination based
5 on his or her own reasonable due diligence. *Id.*; *see also* Dkt. #62 Ex. H, at 15:21-16:11. As such,
6 no securities are actually sold to customers based solely on the firm-level due diligence. Dkt. #62
7 ¶5, Ex. D. Accordingly, to adjudicate this matter as a class, there would need to be an analysis of
8 what each of the 27 individual NSC brokers who sold to different investors did for the due
9 diligence and how they made their suitability determinations about Beamreach.
10

11 Second, this Court determined “[i]f NSC violated its FINRA obligations at the outset and
12 is found to be negligent, liability will likely apply regardless of the different risk tolerances of class
13 members.” Dkt. #66 at 11:8-9. But all that Plaintiffs’ evidence here showed was that Beamreach
14 was a high-risk investment (as disclosed to Plaintiffs), not that it was unsuitable for even a single
15 investor. *See* Dkt. #61 Ex. A, at 6 (“Higher risk securities are offered and sold daily with higher
16 risk premiums”). If the investment was suitable for even one class member, then there can be no
17 liability in this case. Accordingly, each class member’s risk tolerance must be analyzed.
18

19 Further, “if the main issues in a case require the separate adjudication of each class
20 member’s individual claim or defense, a Rule 23(b)(3) action would be inappropriate.” *Zinser*, 253
21 F.3d at 1189. NSC has asserted assumption of risk and comparative fault defenses. Dkt. #31 ¶¶5,
22 6. These are highly individualized defenses that will depend on what each investor knew, what
23 they were told by their broker, what independent research they had done, what they individually
24 knew about Beamreach or the solar market, their risk tolerance, their investing history, and whether
25 they appreciated the risks of investing in Beamreach, among other factors.
26
27

1 As such, Defendant argues that this Court erred when it found the predominance
2 requirement satisfied and seeks review of this Court's determination that common questions
3 predominate over individualized issues with regard to suitability, which represents a substantial
4 issue meriting a stay.

5
6 **B. Defendant Will Be Irreparably Injured Absent A Stay**

7 If this Court denies the stay, Defendant will likely have to provide class-related discovery
8 to Plaintiffs, coordinate with Plaintiffs on a notice plan, prepare dispositive motions, witnesses,
9 jury instructions, trial exhibits, and perform legal analysis on the certified class's claims and
10 damages. The significant expenses, time, and resources entailed in this process may be entirely
11 mooted if the Ninth Circuit reverses class certification. It makes no sense to proceed with the
12 claims of hundreds of class members until the Petition to the Ninth Circuit (and any appeal) are
13 resolved.
14

15 **C. A Stay Will Not Substantially Injure Plaintiffs**

16 A stay of this litigation will not injure Plaintiffs. Plaintiffs will not incur additional
17 litigation costs pending resolution of Defendant's Petition. Additionally, a stay will prevent
18 Plaintiffs from incurring unnecessary and expensive notice and discovery costs if the Petition to
19 the Ninth Circuit is granted and the class certification is reversed.
20

21 **D. Public Interest Favors A Stay**

22 A stay would further public interest because it would promote judicial efficiency and
23 economy. If the Ninth Circuit reverses the class certification, Defendant and Plaintiffs would have
24 to start over with discovery and will have spent unnecessary, time, resources, and money. It does
25 not make sense for the parties to spend time and resources resolving issues relating to this large
26 class of plaintiffs only to find out later that there are only four plaintiffs instead of hundreds of
27

1 class members. *See Hooper*, U.S. Dist. LEXIS 209353, at *4 (finding the “stay promotes the
 2 ‘orderly course of justice’ and judicial efficiency as the parties will not have to engage in discovery
 3 efforts which may later have to be recalibrated, nor will the Court and the parties have to duplicate
 4 their efforts if the Ninth Circuit allows Plaintiffs to proceed as a class.”).

5 **IV. CONCLUSION**

6
 7 For the foregoing reasons, Defendant respectfully requests that this Court grant this motion
 8 and stay all proceedings in this matter until Defendant’s Petition for permission to appeal pursuant
 9 to Rule 23(f) has been finally resolved, or, if granted, until Defendant’s appeal has concluded.

10
 11 Dated: May 13, 2021

12
 13 Respectfully submitted,

14 s/ James R. Morrison

15 Douglas W. Greene, WSBA #22844

16 James R. Morrison, WSBA #43043

999 Third Avenue, Suite 3900

Seattle, Washington 98104

Tel: (206) 332-1380

17 Fax: (206) 624-7317

18 Email: dgreene@bakerlaw.com

Email: jmorrison@bakerlaw.com

19 Daniel J. Buzzetta (*pro hac vice*)

45 Rockefeller Plaza

20 New York, NY 10111

21 Tel: (212) 589-4236

22 Fax: (212) 589-4201

Email: dbuzzetta@bakerlaw.com

23 *Attorneys for Defendant National Securities*
 24 *Corporation*

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2021, I served the foregoing DEFENDANT NATIONAL SECURITIES MOTION TO STAY PROCEEDINGS PENDING APPEAL, via email per the parties' agreement, on the following:

David P. Neuman, WSBA #48176
Israels Neuman PLC
10900 NE 8th Street, Suite 100
PMB #155
Bellevue, Washington 98004
Tel: (206) 795-5798
Email: dave@israelsneuman.com

Alexander N. Loftus
Joseph Wojciechowski
Stoltmann Law Offices
233 S. Wacker, 84th Floor
Chicago, IL 60606
Tel: (312) 332-4200
Email: alex@stoltlaw.com
joe@stoltlaw.com

Joshua B. Kons, Esq.
Law Offices of Joshua B. Kons, LLC
939 West North Avenue, Suite 750
Chicago, IL 60642
Tel: (312) 757-2272
joshuakons@konslaw.com

Attorneys for Plaintiffs

s/ James R. Morrison
James R. Morrison